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THAMILVANEN KANDASAMY

v.

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI, MALAYSIA & ORS

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HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPLICATION NO: 44-128-2006]
5 JUNE 2007

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PREVENTIVE DETENTION: *Detention order - Application for habeas corpus - Complaint of procedural non compliance - Whether minister failed to provide explanation for delay in date of commencement of detention order - Whether applicant denied advocate at the hearing in*

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breach of s. 5(2) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Whether applicant deprived of his right of a fair hearing in breach of art. 151 of the Federal Constitution - Whether habeas corpus issued

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This was the applicant's application for a writ of *habeas corpus ad subjiciendum*. The applicant challenged the validity of a detention order dated 22 April 2004 made by the Deputy Minister of Internal Security under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') and

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extended under s. 7A(1)(a) of the Ordinance. His detention commenced from 25 April 2004. The applicant had put forward three grounds to substantiate his complaint of procedural non-compliance: (1) the Minister had failed to provide an explanation for the delay in the date of commencement of the detention order;

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(2) the applicant was deprived of his entitlement to representation during the advisory board hearing in breach of art. 5(3) of the Federal Constitution; (3) the applicant was deprived of his right of a fair hearing in that he was deprived of the opportunity to cross examine the witnesses during the advisory board hearing in breach of art. 151 of the Federal Constitution.

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Held (allowing the application and issuing a writ of *habeas corpus*):

(1) The several matters deposed to by the Minister did not afford

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an explanation as to why the date of the detention order differed from that of the commencement of the order. Moreover, these statements did not comprise explanations that were in existence or available to the Minister at the time when

the detention order was made, but instead appeared to be reasons put forward subsequently to explain the gap in the dates. As a consequence, there had been non-compliance with a procedural requirement relating directly to the making of the detention order. (para 4)

(2) The applicant ought to have set out the particulars of his request for an adjournment to appoint an advocate, and how and on what basis this request was apparently refused. In view of the applicant's failure to respond to the secretary and affidavits, there was insufficient basis to substantiate the applicant's complaint of having been denied an advocate at the hearing in breach of s. 5(2) of the Ordinance. Furthermore, the board was entitled to refuse to disclose the notes of proceedings by reason of the privilege accorded to it under r. 10 and s. 11 of the Ordinance. On this ground of procedural non-compliance, the respondent failed to discharge the evidentiary burden which rested on him to show that he did in fact request for an adjournment to procure representation by an advocate. Accordingly, this ground failed. (para 5)

(3) Where the board decides in its discretion that a witness or police officer is to be heard in the absence of the detained person or his advocate, then the entitlement to cross examine such a witness or police officer is also lost. To that extent therefore, the right to make representations has been expressly defined, and such definition permits the advisory board in the exercise of its discretion not to allow cross examination during a hearing. By virtue of art. 151(3), s. 11 of the Ordinance and r. 10. the advisory board and the Minister can state that they are unable to furnish the reasons for such an exercise of discretion in the interests of national security. The exercise of their discretion under these sections is not reviewable by virtue of s. 7C of the Ordinance save with regard to any failure to comply with a procedural requirement governing such decision. The decision not to provide facts or evidence to substantiate why national interests would be adversely affected is not a procedural requirement as envisaged by s. 7C. Such non-production on the part of the minister or the advisory board does not amount to non-compliance with a procedural requirement. This ground must also therefore fail. (para 6)

(4) However, the applicant had succeeded in establishing one ground of procedural non-compliance and therefore this application was allowed and a writ of *habeas corpus* issued. (para 6)

Case(s) referred to

Dr Mohd Nasir Hashim v. Menteri Hal Ehwal Dalam Negeri [2007] 1 MLJ 19 CA ***(refd)***

Ex parte Austco Pty Ltd [1985] 2 QD R 1 ***(refd)***

JP Berthelson v. Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 ***(refd)***

Kumaran Suppiah v. Dato' Noh Hj Omar & Anor [2006] 4 CLJ 675 FC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Arasa Kumaran [2006] 4 CLJ 847 FC ***(refd)***

Pihak Berkuasa Sabah v. Sugumar Balakrishnan & Anor Appeal [2002] 4 CLJ 105 FC ***(refd)***

Tai Choi Yu v. Government of Malaysia [1994] 2 CLJ 174 SC ***(refd)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989, s. 2

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(2), (3), 4(1), 4C, 5(2), 7A(1)(a), 11, 54(2)

Federal Constitution, arts. 5(3), 151(3)

Public Order and Prevention of Crime (Procedure) Rules 1972, r. 10

For the applicant - En Alvinthiren; M/s Alvinthiren & Parts
For the prosecution - Tengku Amir Zaki; A'G Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JC:

Introduction

[1] This is an application by Thamilvanen a/l Kandasamy ('the applicant') for a writ of *habeas corpus ad subjiciendum*. The applicant challenges the validity of a detention order dated 22 April 2004 made by the Deputy Minister of Internal Security under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') and extended under s. 7A(1)(a) of the Ordinance. His detention commenced from 25 April 2004.

The Law

[2] In his affidavit in support of the application, the applicant has set out numerous grounds on which he challenges the Minister's Order, both substantive and procedural. However, at the hearing of this appeal, in keeping with the decision of the Federal Court in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors.* [2005] 3 CLJ 914, the applicant's counsel, Mr. Suresh Thanabalasingam, confined himself to three instances/ grounds of procedural non-compliance. In that case, Abdul Hamid Mohamad FCJ, in delivering the judgment of the Federal Court referred to the amendment of the Ordinance in 1989 *vide* the Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989 ('Act A740') whereby ss. 7C and 7D were inserted. He stated that:

> ... The provisions of ss. 7C and 7D are clear. The effect of the amendments is that, in a *habeas corpus* application such as in this case, the detention order made by the Minister under s. 4(1) of the Ordinance may only be challenged on ground of non-compliance with any procedural requirement, and nothing else ...

And further in the judgment:

> ... In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD(SPM) Act 1985, *the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof.* Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance ...

The Applicant's Grounds Of Procedural Non-compliance

[3] The applicant has put forward three grounds to substantiate his complaint of procedural non-compliance. The three grounds are:

A (i) The Minister has failed to provide an explanation for the delay in the date of commencement of the detention order. Such matters as have been deposed to in his affidavit are not "explanations" which were available at the time of the making of the detention order;

B (ii) The applicant was deprived of his entitlement to representation during the advisory board hearing and breach of art. 5(3) of the Federal Constitution;

C (iii) The applicant was deprived to his right of a fair hearing in that he Was deprived of the opportunity to cross-examine witnesses during the advisory board hearing in breach of art. 151 of the Federal Constitution.

D **Ground (i): The Minister Has Failed To Provide An Explanation For The Delay In The Date Of Commencement Of The Detention Order**

[4] The detention order under s. 4(1) of the Ordinance is dated 22 April 2004. However it stipulates the date of commencement E of the detention as 25 April 2004. The date of commencement is therefore subsequent to the date of the detention order. There is a delay of three days. By virtue of the decision of the Federal Court in *Kumaran Suppiah v. Dato' Noh Hj Omar & Anor.* [2006] 4 CLJ 675 *('Kumaran Suppiah')* such delay has to be explained, F as it is a constituent part of s. 4(1) of the Ordinance. This is what the Federal Court said:

> ... The fact that s. 4(1) of the Ordinance is silent with regard to the time within which the detention order must be made to take effect does not mean that the Minister has G a complete discretion in determining the date. Where no time has been prescribed for the doing of an act in a statutory provision it must be read with s. 54(2) of the Interpretation Act 1967 ("s. 54(2)") which reads as follows:
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> H Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

In cases such as *Tai Choi Yu v. Government of Malaysia* [1994] 2 I CLJ 174 and *Ex parte Austco Pty Ltd* [1985] 2 QD R 1 it was observed that what will be "all convenient speed" will depend upon the facts and peculiar circumstances of each case. As s. 4(1)

of the Ordinance read with s. 54(2) deals with preventive detention it must be strictly construed. *Thus the requirement as to the time within which a detention order must be made to take effect must be the same or as close as possible to the date of making of the detention order. Where both the dates do not coincide the delay must be explained.* This is in line with the rule that any delay in a matter that must be done within a reasonable time must be satisfactorily explained *... The necessity for such an explanation must therefore be read as a constituent part of s. 4(1) of the Ordinance ... Thus where there is a delay in the date of commencement of a detention order the requirement of an explanation for the delay must have been complied with. A failure to provide any reason to explain the delay in the effective date of a detention order will thus mean that there has been a breach of s. 4(1) of the Ordinance ...* (emphasis added)

[4.1] In his affidavit in reply of 20 March 2007, the Minister did depose to certain facts which he said comprised explanations for the delay of three days:

(a) The Minister was advised that at the material time of signing the detention order, the position of law was that the Minister was under no legal obligation when exercising his powers under s. 4(1) of the Ordinance to ensure that the date of the detention order coincided or corresponded with the commencement of the detention;

(b) The date of the detention order and the commencement of detention had to begin before the 60 day detention in police custody under s. 3(3) of the Ordinance came to an end;

(c) The Minister reiterated that the gap of three days between the date of signing of the detention order and the date of commencement of the detention was necessary for logistical purposes to ensure that the applicant's transfer or relocation from police custody to Ministerial detention in Simpang Rengam was executed without compromising the safely and security aspect of the whole process.

4.2 While the adequacy or sufficiency of these explanations put forward by the Minister cannot be the subject of judicial review, the availability of such explanations at the time when the Minister made his decision, can be deliberated upon as this comprises a significant part of the decision making

process. However, before this issue can even be considered, another concern needs to be addressed. It is this: As the original detention order under s. 4(1) of the Ordinance in this case was made on 22 April 2004, prior to the detention order in *Kumaran Suppiah*, which was in December 2004, it is contended by the learned senior federal counsel, Najib bin Zakaria, that there was no legal obligation to explain the delay or gap between the date of the order and the date of commencement of the detention.

Support for this proposition was cited from *Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Arasa Kumaran* [2006] 4 CLJ 847 where the Federal Court observed as follows:

> ... when the detention order was made in this case there was no legal obligation on the Appellants to explain the delay in the effective date of the detention order. Accordingly it is our view that learned Counsel took the correct stand in withdrawing the objection ...

Accordingly it is submitted that the decision in *Kumaran Suppiah* was not meant to have retrospective effect. As such the learned senior federal counsel maintained that there was no necessity to explain the gap of three days in the instant case, where the detention order preceded that in *Kumaran Suppiah*. In further support, *Wigneswaran a/l Ponnusamy v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & 3 Ors.* was cited where Dato' Zaharah Ibrahim J decided that *Kumaran Suppiah*'s case did not have retrospective effect.

[4.3] In both *Menteri Keselamatan Dalam Negeri, Malaysia & Ors. v. Arasa Kumaran* and *Wigneswaran a/l Ponnusamy v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & 3 Ors.* the Minister did not proffer any explanation for the delay between the detention order and the commencement of the detention order. In the instant case, however, the Minister has furnished more than one ground to explain the reason for the delay. While maintaining that there is no legal obligation to explain the delay in the dates, the Minister has also seen fit to provide an explanation for that delay. The Minister's stance therefore appears to be equivocal as to the need to explain the delay in the dates. I am of the view that given the existence of the Minister's explanation on affidavit,

it would be anomalous to ignore such explanations pertaining to the delay. In any event any such consideration of the explanations would be limited to the availability of such explanations at the time of making the decision.

[4.4] The explanations put forward by the Minister are three-fold:

(a) He affirmed that he had been advised at the material time that there was no requirement in law that the date of the detention order had to correspond with the date of commencement of the detention. The issue that arises for consideration is whether such an explanation was indeed available at the time when the Minister made the detention order. In *Kumaran Suppiah* it was said:

> … the need to explain a delay in the date of commencement of a detention order is a constituent part of **s. 4(1) of the Ordinance.** It is a condition precedent to the making of a detention order in such a situation. **There must therefore be in existence an explanation in such cases before the making of the detention order.** It must be observed that the sufficiency of the explanation cannot be the subject of judicial inquiry as it is a matter within the discretion of the Minister. **That however, cannot be said of the availability of the explanation itself at the time of the making of the detention order …** (emphasis added)

The statement of the Minister that he was advised that there was no requirement in law that the dates of the detention order and commencement of detention had to match, does not explain why the Minister at the relevant time, chose to date the detention order 22 April 2004, and the date of commencement of the order, subsequently, on 25 April 2004. Instead it purports to afford an explanation after the event, as to why the delay in the two dates was not material at the time. This explanation could not have been in existence before the making of the detention order because at that time it did not matter if there was a delay between the dates. In short, there was no legal obligation at that time to ensure that the two dates matched and that if they did not, an explanation had to be given. As such it

does not afford an explanation which would have been in existence when the Minister signed the detention order on 22 April 2004 and decided to make the date of commencement a subsequent date, on 25 April 2004.

Neither the sufficiency nor adequacy of this statement as an "explanation" is reviewed in arriving at this conclusion.

[4.5] The Minister went on to give a further explanation for the delay between the dates.

(b) He stated that the date of the detention order and the commencement of detention had to begin before the 60 day detention in police custody under s. 3(3) of the Ordinance came to an end. This 60 day period came to an end on 25 April 2004. Therefore the Minister maintains that he signed the detention order on 22 April 2004 with the knowledge that the 60 day period of police detention would end on 25 April 2004, hence the date of commencement of the detention was, stipulated to be 25 April 2004. Does this afford an explanation as to why the date of the detention order differs from that of its commencement? It would not appear so. The fact that the detention order and detention had to commence before the expiry of the 60 day period of police custody does not explain why the dates of the order and the commencement of detention differ. It only affords an explanation as to why both dates had to take effect before or upon the expiry of the detention under s. 3(3) of the Ordinance. As it does not explain the difference in the dates, this statement appears to be an attempt to formulate a basis for the gap of three days belatedly, rather than an explanation that was available at the time the Minister made the detention order.

[4.6] The Minister afforded a third explanation for the gap between the dates.

(c) He deposed that the delay of three days between the date of the detention order and the commencement of detention was minimal, and executed as expeditiously as possible, taking into account that the police needed to ensure that the applicant's transfer or relocation from

police custody to Ministerial detention in Simpang Rengam was executed without compromising the safety and security aspect of the whole process. In other words, the explanation is that the delay of three days arose to enable the applicant to be safely transported from Penang where he was being held in police custody, to Simpang Rengam on or by 25 April 2004 when the Ministerial detention commenced.

But by virtue of s. 4C of the Ordinance, no detention order is rendered invalid or inoperative simply because the applicant is detained anywhere other than Simpang Rengam, or continues to be detained where the police had detained him or was on his way to Simpang Rengam. Moreover service of the detention order can be effected wherever the applicant is as of the date of the order. Therefore it would not be necessary to transport the applicant to Simpang Rengam before the detention order took effect, because s. 4C provides for the sanctity of such order wherever the applicant is served. Given the existence of s. 4C, the Minister's explanation would not appear to have been an available explanation at the time when he made the detention order.

In any event the detention order was served on the applicant in Penang on 25 April 2004, where he had been detained in police custody. Therefore, even as of 25 April 2004, the applicant had not been transported to Simpang Rengam. The explanation for the difference in the dates therefore could not have been an available explanation in existence at the time when the Minister made the detention order. In so concluding the substance of the reason given by the Minister is not judicially reviewed. Instead it is the availability or existence of such an explanation that has been examined, as it is a significant part of the decision making process.

[4.7] The several matters deposed to by the Minister therefore do not afford an explanation as to why the date of the detention order differs from that of the commencement of the order. Moreover these statements do not comprise explainations that were in existence or available to the

Minister at the time when the detention order was made, but instead appear to be reasons put forward subsequently to explain the gap in the dates. As a consequence there has been non-compliance with a procedural requirement relating directly to the making of the detention order.

[5] Issue (ii): The Applicant Was Deprived Of His Entitlement To Representation During The Advisory Board Hearing In Breach Of art. 5(3) Of The Federal Constitution

[5.1] The second ground put forward by the applicant is that he was deprived of his right to representation by an advocate during the hearing of the advisory board. He affirmed that during the hearing he applied for an adjournment to appoint an advocate but this request was denied. He also sought the production of the notes of proceedings of the advisory board hearing to substantiate his claim.

[5.2] In response, the Secretary to the advisory board affirmed an affidavit exhibiting the requisite forms that show that the applicant indicated expressly that he did not want to be represented at the hearing by an advocate. In accordance with s. 3(2) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 the applicant was served with Form 1 after he had been advised of his right to make representations against the detention order. A review of Form 1 filled in by the applicant on 27 April 2004 reveals that the applicant indicated that he did not require representation by counsel. The form was translated to him by one Rajendran a/l Murugan. And in Form 2, which is the notice of hearing of the applicant's representations, issued pursuant to 5(1) of the Ordinance, the applicant again maintained that he did not want to be represented by an advocate at the hearing on 14 June 2004. Form 2 was translated to him by one Norhairy bin Mohd. Yali, who also affirmed an affidavit in these proceedings.

[5.3] At the hearing on 14 June 2004, the translation of the proceedings in Tamil was undertaken by one Harun bin Musa. The said Harun bin Musa deposes that the applicant was appraised of, and participated in the proceedings. He does not state that the applicant asked for representation by an advocate during the hearing and that such a request was

refused. The Secretary also states that at the hearing the applicant was informed of his right to representation by counsel. According to the Secretary, no application was made by the applicant at the hearing for representation. He goes on to state that if indeed the applicant had made such an application, an adjournment would have been granted to afford the applicant such representation.

[5.4] The applicant did not file a reply to the Secretary's or Musa's affidavit to refute their statements and specify expressly at what stage and how he had asked for an adjournment to appoint an advocate and how or why this was refused. Instead it was maintained by his counsel. Mr. Suresh Thanabalasingham in submission and as set out in his original affidavit that the notes of proceedings in respect of the advisory board hearing ought to be disclosed to ascertain whether such a request was in fact actually made. The Secretary's response to this in his affidavit was to refuse such disclosure on the basis that national interests would be adversely affected by such disclosure. The Secretary is entitled to refuse disclosure under s. 11 of the Ordinance.

[5.5] In my view, the applicant ought to have filed a response to the Secretary's and Harun's affidavits. He ought to have set out the particulars of his request for an adjournment to appoint an advocate, and how and on what basis this request was apparently refused. In view of the applicant's failure to respond to the Secretary and Harun's affidavits there is insufficient basis to substantiate the applicant's complaint of having been denied an advocate at the hearing in breach of s. 5(2) of the Ordinance. Furthermore the board is entitled to refuse to disclose the notes of proceedings by reason of the privilege accorded to it under r. 10 and s. 11 of the Ordinance.

In summary on this ground of procedural non-compliance, the respondent has failed to discharge the evidentiary burden which rests on him to show that he did in fact request for an adjournment to procure representation by an advocate. Accordingly this ground fails.

A **[6] Ground (iii): The Applicant Was Deprived Of His Right Of A Fair Hearing In That He Was Deprived Of The Opportunity To Cross-examine Witnesses During The Advisory Board Hearing In Breach Of art. 151 Of The Federal Constitution**

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[6.1] The applicant's third grievance is that he was not accorded the full opportunity of a fair hearing in accordance with the principles of natural justice in that:

C (a) He was not allowed to be present when various police witnesses were interviewed or met with the advisory board. As such he did not hear the charges or complaints against him, thereby precluding him the opportunity of defending himself against such charges;

D (b) He was not accorded the opportunity to cross-examine some of the witnesses who appeared before the advisory board, thereby again depriving him of the opportunity to fully defend himself;

E (c) The privilege of non-disclosure as set out in art. 151(3) and s. 4 of the Ordinance could not simply be "recited" in explaining why the applicant was not allowed to be present throughout the hearing and thereby precluded from cross-examining some of the F witnesses, but required the provision of some evidence or particularization justifying the basis for such non-disclosure.

[6.2] In support of this proposition applicant's counsel cited *Kanda v. Government of India* the *locus classicus* which G enunciates the principle of *audi alteram partem*. Reliance was also placed on *J.P. Berthelson v. Director General of Immigration, Malaysia & Ors.* [1987] MLJ 134 to refute the Secretary of the board's response that the advisory board in the exercise of its discretion determined that having regard H to considerations of security in the national interest, the applicant was not accorded the opportunity to hear all the witnesses and cross-examine them. The applicant's contention was that to simply state that disclosure would be contrary or adverse to national interests without more, was I mere incantation without affording a sufficient particularization for the basis of such non-disclosure.

[6.3] Article 151 of the Federal Constitution and ss. 4 and 5 of the Ordinance expressly protect the applicant's right to make representations against his detention in accordance with the principles of natural justice. In short, the principle of *audi alteram partem* is expressly safeguarded. These provisions afford the applicant the opportunity of making representations against the detention order as soon as may be.

Does this right of representation include the right to be present to hear the charges/complaints made against the detainee during the advisory board hearing as well as the right to cross-examine these witnesses? It would appear not. By virtue of r. 10 of the Public Order and Prevention of Crime (Procedure) Rules 1972 there is express provision that a board "... may in its discretion having regard to considerations of security in the national interest determine whether a witness should or should not be heard in the presence of the applicant or his advocate, and whether any police officer should or should note be required to appear before the board in the presence of the applicant or his advocate ...

Article 151(3) and s. 11 of the Ordinance provide that the detaining authority is not required to disclose facts where such disclosure "would, in its opinion, be against the national interest". This accords the Minister a complete shield enabling him to decide in his discretion not to disclose facts or to produce documents which he considers to be against the national interest to disclose.

[6.4] It is therefore evident that the legislature has seen fit to expressly allow the Minister and/or the advisory board in its discretion:

(a) To conduct the advisory board proceedings in such matter as it deems fit including the right to require the detainee to absent himself where it is thought fit, in the interests of national security. (r. 10); and

(b) Not to disclose facts whose disclosure would, in its opinion, be against the national interest (art. 151(3) and s. 11 of the Ordinance)

Accordingly where the board decides in its discretion that a witness or police officer is to be heard in the absence of the detained person or his advocate, then the entitlement to cross-examine such a witness or police officer is also lost. To that extent therefore the right to make representations has been expressly defined, and such definition permits the advisory board in the exercise of its discretion not to allow cross examination during a hearing. By virtue of art. 151(3), s. 11 of the Ordinance and r. 10, the advisory board and the Minister can state that they are unable to furnish the reason for such an exercise of discretion in the interests of national security. This privilege is afforded to the advisory board and the Minister under r. 10 and s. 11 of the Ordinance. That such express statutory provisions are valid and constitutional despite the encroachment into the rights of natural justice may be gleaned from *Pihak Berkuasa Sabah v. Sugumar Balakrishnan & Anor. Appeal* [2002] 4 CLJ 105.

[6.5] Do these statutory provisions then afford a complete shield such that the detaining authority is entitled to refuse the detainee or his advocate the opportunity to hear the entirety of the evidence against him and cross-examine the witnesses by simply affirming an *ipse dixit* that it is not in the national interests to do so?

The applicant maintains that this is not so. He cites *James Peter Bethelsen v. Director-General of Immigration, Malaysia & Ors.* [1987] 1 MLJ 134, where Abdoolcader SCJ said:

> ... We would add that in any event adequate evidence from responsible and authoritative sources would be necessary on the security aspect and no reliance can be placed in that regard on a mere *ipse dixit* of the first respondent to that effect in the notice of cancellation of the employment pass which the learned judge purported to accept without more ado ...

The applicant relies on the above to contend that the advisory board and the Minister are bound to provide some evidential basis to substantiate the claim that it would be against the national interest to disclose why the applicant was denied the opportunity of hearing the evidence against him and cross-examining the witnesses. Without such an

explanation, the use of these provisions would amount to mere incantation without any real basis. *Dr. Mohd Nasir Hashim v. Menteri Hal Ehwal Dalam Negeri* [2007] 1 CLJ 19 was cited in further support of this contention.

[6.6] In response the respondents maintain that a parallel cannot be drawn between the aforesaid cases because in neither of these cases was there in existence the equivalent of art. 151(3) and s. 11 of the Ordinance, both of which provide an express statutory shield allowing the Minister to decide that he cannot disclose any facts for fear that it might adversely affect national interests.

To my mind, art. 151(3) and s. 11 of the Ordinance which are peculiar to preventive detention provide a statutory privilege to the Minister and the advisory board. The exercise of their discretion under these sections is not reviewable by virtue of s. 7C of the Ordinance save with regard to any failure to comply with a procedural requirement governing such decision. The decision not to provide facts or evidence to substantiate why national interests would be adversely affected is not a procedural requirement as envisaged by s. 7C. As such, such non-production on the part of the Minister or the advisory board does not amount to non-compliance with a procedural requirement. This ground must also therefore fail.

However the applicant has succeeded in establishing one ground of procedural non-compliance and therefore this application is allowed and a writ of *habeas corpus* issued.